82-1225

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HARTLEY E. GREENLEAF, JR.,
PETITIONER

V.

UNITED STATES OF AMERICA,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a failure by the defendant to renew a motion for a judgment of acquittal at the close of the case when a minimal defense is presented waives the opportunity for a review of the sufficiency of the evidence on appeal?

2. Whether a mailing which occurs a significant time after the completion of a scheme to defraud and neither advances nor conceals the scheme is sufficiently related to the execution of the fraud to support a conviction for mail fraud.

3. Whether the imposition of consecutive sentences for violations of the Racketeering Corrupt Organizations Act (18 U.S.C. sec. 1962(c)) and the predicate offenses of mail fraud is

violative of the defendant's Fifth Amendment protection against double jeopardy.

4. Whether it is reversable error for the trial judge to instruct the jury that a person intends the natural and probable consequences of his actions when conviction beyond a reasonable doubt was based upon a finding of specific intent.

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B. OPINIONS BELOW

The petitioner (f/n 1.) was convicted before the Honorable Andrew J. Caffrey in the United States District Court for the District of Massachusetts on March 8, 1982.

The judgment was affirmed (f/n 2.) by the United States Court of Appeals for the First Circuit on November 2, 1982. Mandate issued on November 23, 1982 upon denial of a Motion For Stay Pending Review In This Court.

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f/n 1 - William Bratton was charged and convicted of mail fraud and racketeering along with the petitioner.

f/n 2 - The judgment against co-defendant Bratton was also affirmed.

C. JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254(1).

D. CONSTITUTIONAL, STATUTORY & RULES PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Consitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. sec. 2 (reproduced in Appendix)

3. 18 U.S.C. sec. 1341 (reproduced in Appendix)

4. 18 U.S.C. sec. 1961 (reproduced in Appendix)

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7. Fed. R. Crim. P. 29 (reproduced in Appendix)

E. STATEMENT OF THE CASE

The petitioner, Hartley E. Greenleaf, Jr., was convicted of aiding and abetting

Joseph "Gus" Manning in a scheme to defraud the producers of two motion pictures filmed in Boston in 1977 and 1978 (f/n 3) and Local 25 of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America. The alleged scheme consisted of placing names of people who did not work on the production company payrolls to generate payroll checks and union pension contributions. Mr. Manning was a trustee of Local 25 and the man responsible for negotiating Teamster contracts with all motion picture companies filming in New England.

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f/n 3 - The indictment also charged Joseph Manning, Ernest Sheehan and William Bratton in connection with the fraudulent scheme. Manning was severed after three days of trial because of chest pains and resultant hospitalization. Sheehan was severed for health reasons prior to the jury's being sworn. Bratton was tried and convicted jointly with the petitioner.

The petitioner was selected by Manning to be the Teamster driver captain on the productions of the motion pictures International Velvet and Oliver's Story. In this capacity he supervised the drivers on the set and on a weekly basis distributed time cards, collected and approved them, submitted them to the movie company supervisors and then dispensed the resulting paychecks. He also saw to it that W-4 forms were filled out for each driver (f/n 4.).

International Velvet was produced in Boston in September 1977 by Metro-Goldwyn Mayer (MGM). Prior to the commencement of production, Gus Manning

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f/n 4 - Co-defendant Bratton served the same function on the production of the motion picture The Brinks Job. The defendants were not alleged to have any connection with each other in carrying out the schemes.

met with the unit production manager, Peter Runfolo, and negotiated the terms for supplying Teamster drivers for vehicles used by the company. Runfolo did not agree to provide for drivers who would not show up for work. Drivers were subsequently assigned to the job and Greenleaf appointed Teamster Captain.

In 1978, Paramount Pictures filmed Oliver's Story in Boston. A similar sequence of events preceeded the production company's arrival in town. Manning met with the production manager, Richard McWhorten, and negotiated the deal for drivers without any agreement about workers who would not show. Manning then assigned drivers and appointed Greenleaf Teamster Captain.

The government alleged that fraud was perpetrated by submitting time cards

and W-4 forms for three men who never appeared on the movie sets. On International Velvet payroll checks were issued for Francis Manning and Benjamin DeFlumere. Manning was found to be a fictitious person and DeFlumere is Gus Manning's son-in-law who was with him in Hawaii at the time. On Oliver's Story checks issued to Henry Gatto for work he did not do.

These payroll checks were issued by the location auditors and accountants on the particular production. In preparing the payroll they relied on the time cards received directly from Greenleaf or a production supervisor after Greenleaf collected them from the drivers who had filled them out, sometimes with Greenleaf's assistance. The mail was not used in this transaction. Once prepared, the checks passed in reverse

through the same channels, again without the use of the mail (f/n 5).

The mail fraud charges were based upon the mailing of W-2 forms and pension remittance reports and checks a significant time after the receipt of the object of the fraud - the paychecks. (f/n 6). In the case of the film

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f/n 5 - At trial the government presented evidence that Greenleaf filled out the time cards and W-4 form for Benjamin DeFlumere and time sheets for Henry Gatto. Gus Manning filled out the Gatto W-4. Furthermore, the paycheck for the fictitious Francis Manning had been endorsed by Gus Manning and evidence indicated that he may also have been the endorser on the Gatto and DeFlumere checks. It was clear that the petitioner was not the recipient of any of the funds. In fact, both Gatto and DeFlumere received payment from Manning for their "no show" status.

f/n 6 - The film companies were obligated to make contributions to the Teamster Pension Fund and Health and Welfare Fund. The amount of the contribution was determined by multiplying the contracted rate by the hours each person purportedly worked.

International Velvet, the W-2 forms were mailed after the first of the next year by the patroll company hired by MGM to handle the film company clerical and accounting procedures. The information on the W-4 forms was, of course, used to prepare the W-2s. They also dealt in the normal course of their business with the pension and health and welfare contributions for their many employees, mailing them to the appropriate party. In this case, the contributions went to Add-Men Services Inc. and the Teamster Pension Fund who administered the Teamster benefit programs. A similar procedure was followed by Paramount and their in-house accounting department on the Oliver's Story production.

F. REASONS FOR GRANTING THE WRIT

I. THE DEFENDANTS FAILURE TO RENEW A MOTION FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE DID NOT WAIVE REVIEW OF THE SUFFICIENCY OF THE EVIDENCE.

The petitioner argued the sufficiency of the evidence on appeal to the United States Court of Appeals for the First Circuit. The government contended that petitioner Greenleaf was precluded from arguing the sufficiency of the evidence on appeal due to a failure to move for a judgment of acquittal at the close of all the evidence. The government suggested that a defendant must renew a motion for judgment of acquittal denied at the close of the government's case if a defense is presented or waive an opportunity for review of the sufficiency of the evidence on appeal.

The petitioner moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 at the close of the government's case. The trial judge denied the motion. In effect, this functioned as a reservation pending an opportunity for the defense to fill in factual gaps in the evidence. 8A Moore's Federal Practice sec. 29.03[1]. The defendant then offered one witness and rested. All parties then rested their cases (f/n 7). The trial judge allowed the initial denial to stand f/n 8).

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f/n 7 - All of these actions took place on the seventh day of trial.

f/n 8 - It is important to realize the discretion given the trial judge to rule on the matter of the sufficiency of the evidence at the close of the evidence with or without a motion by the defendant. Advocates of the waiver doctrine pose that its value lies in the desirability of affording the trial judge the opportunity to rule in the first instance. The First Circuit erroneously stated that the defendant's failure to so move in fact denied the judge this opportunity (App. p. 3(a)6.) Quite simply, this is incorrect.

The First Circuit adopted the government's position. The Court relied on its ruling in United States v. Kilcullen, 546 F2d 435 (1 Cir. 1976). The Court went on to consider the evidence in support of the defendant's conviction applying the stricter standard of "clear & gross injustice." As a result, the Court held that though "the connection between the alleged schemes and the mailings poses a close question (emphasis added), we are unable to find that convictions based on these mailings are clearly and grossly unjust." (App. 3(a)7). Such a ruling in light of the Court's inability to ennunciate the legal principal central to the determination is clearly erroneous. (see Reasons for Granting the Writ Part II).

A. The Defendant's Motion For Judgment Of Acquittal At The Close Of The Government's Case Adequately Preserved The Right To Appeal The Sufficiency Of The Evidence Where The Defense Presented Only Minimal Evidence Of No Benefit To The Government

Had the defendant rested without presenting evidence the waiver doctrine would not have operated to erase the right to appeal. Since he did he was punished. If a defendant chooses to present a defense and presents nothing of use to the government, the reasonable approach is to disregard the necessity of a renewal of the motion. Cephus v. U.S., 324 F.2d 893,895 (D.C. Cir. 1963). Such a practice makes particular sense in a situation where a defendant makes a minimal presentation and rests within a matter of hours of the initial denial. Cephus v. U.S., supra. No one need be reminded of his belief that the

evidence presented against him is insufficient to establish guilt.

The spirit and intent of the procedural rules are not compromised by disregarding a harmless failure to renew the motion where an initial motion has been made. The appellate court is not considering an issue not raised before the trial judge. In fact, justice is enhanced by encouraging both sides to present their positions without fear of suffering irreparable prejudice.

B. There Is A Conflict Among The Circuits As To The Operation Of Fed. R. Crim. P. 29 and The Status of The Waiver Doctrine. This Court Should Resolve This Conflict

The traditional rule has been that a defendant's failure to move for a judgment of acquittal at the close of

all the evidence precludes him from raising it on appeal. U.S. v. Oliver, 570 F2d 397,403 (1 Cir. 1978)' U. S. v. Phipp, 543 F2d 576,577 (5 Cir. 1976); U.S. v. Newsome, 444 F2d 109,110 (6 Cir. 1971); U.S. v. Martinez,514 F2d 334,337 (9 Cir. 1975). However, there has been considerable erosion of the rule. It is now equally recognized in the majority of circuits that where a manifest miscarriage of justice has occurred, the appellate court may review the sufficiency of the evidence despite a failure to renew the motion for judgment of acquittal at the close of all the evidence. U.S. v. Kilcullen at 441; U.S. v. Stamas, 443 F2d 860 (1 Cir. 1971) cert. den. 404 U.S. 851, 30 LEd 2d 90,92 S.Ct. 86; U.S. v. Kaplan, 586 F2d 980 (2 Cir. 1978); U.S. v. Renee Ice Cream Co., 160 F2d 353 (3 Cir. 1947); U.S. v. Owens, 453 F2d 355 (5

Cir. 1971); U.S. v. Landers, 484 F2d 93 (5 Cir. 1973), cert. den., 415 U.S. 924, 39 LEd 2d 480, 94 S.Ct. 1428; Carr v. U.S., 278 F2d 702 (6 Cir. 1960); U.S. v. Curtis, 568 F2d 643 (9 Cir. 1978).

The Seventh Circuit appears to have abandoned the waiver rule altogether. U.S. v. Rizzo, 416 F2d 734,736 n.3 (7 Cir. 1969). The Eighth Circuit gives the rule only partial effect by reviewing the sufficiency of the evidence despite a failure to renew, considering the evidence of both the government and the defendant. U.S. v. Sanders, 547 F2d 1037, 1040 n.5 (8 Cir. 1976); United States v. McIntyre, 467 F2d 274,276 n.1 (8 Cir. 1972), cert. denied, 410 U.S. 910 (1973). The D.C. Circuit overlooks the omission entirely in certain circumstances, Cephus v. U.S., supra.

The First Circuit is similarly disposed to on one hand assert the rule yet on the other hand ignore it. The sufficiency of the evidence has been consistently reviewed to determine whether a miscarriage of justice has occurred and a defendant wrongly convicted. U.S. v. Kilcullen, at 441; U.S. v. Sanborn, 563 F2d 488, 490 (1 Cir. 1977); U.S. v. Bynum, 567 F2d 1167,1171 (1 Cir. 1978); U.S. v. Oliver at 403 (1 Cir. 1978). Yet, the result, like that in the present case, often turns on a procedural "but for". If one is not to be deprived of liberty without due process, it seems manifestly unjust to so deprive for failure to follow a rule which is given little respect by those charged with its enforcement.

II. THE MAILINGS WERE NOT SUFFICIENTLY RELATED TO THE SCHEME TO DEFRAUD AS REQUIRED FOR A MAIL FRAUD CONVICTION UNDER 18 U.S.C. SEC. 1341.

Upon review, the First Circuit found that the mailings in furtherance of the alleged scheme to defraud "occurred a significant time after the receipt of the object of the scheme." (App.3(a)8). They furthermore stated that "the law is in some confusion regarding when mailings will be found to have been in furtherance of a fraudulent scheme." (App. 3(a)9). Nevertheless, the judgment of the trial court was affirmed finding "no such egregious misapplication of legal principles as to constitute clear & gross injustice." (App. p. 3(a)13). The petitioner is at a loss as to how the court can find no egregious misapplication of legal principle when it admittedly cannot state the legal principle which

governs. Justice requires more than a coin toss.

The government argued at trial and on appeal that any time one sets in motion a scheme to defraud which inevitably results in a mailing, he can be guilty of mail fraud. The petitioner disagreed with this notion asserting that the law requires that the mailings be sufficiently related to the scheme so as to be necessary to its success. The W-2 forms and pension checks at issue were mailed some time after the receipt of the fruit of the scheme and had little if any effect upon the success or failure of the scheme.

The government's argument was based on the requirement that:
(1) to be sufficiently closely related to a fraudulent scheme, "it is not

necessary to contemplate the use of the mails as an essential element." Pereira v. United States, 347 U.S. 1,8 (1954) and (2) the success of the scheme must depend on mailings "designed to lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and, therefore, make the apprehension of the defendant less likely than if no mailings had taken place." United States v. Maze, 414 U.S. 395, 403 (1973); Parr v. United States, 363 U.S. 370 (1960). In fact, the evidence did not support a finding that the mailings had this effect.

The First Circuit began its review with the two basic requirements this Court stated in the Pereira and Maze decisions. (App. 3(a)9). The Court then noted the disparate and conflicting interpretations these precepts have

produced when courts face the question of when a mailing will be found to be in furtherance of a fraudulent scheme.

The Seventh Circuit gives a broad sweep to the statute finding conviction appropriate if a mailing is a "normal concomitant(s) of a transaction that is essential to the fraudulant scheme." (App.3(a)10 quoting United States v. Galloway, 664 F2d 161,163 (7 Cir. 1981). The Third, Fourth & D.C. Circuits are more restrictive, requiring evidence that the mailing furthered the scheme or concealed the fraud. (App. 3(a)11).

The government theory in support of Mr. Greenleaf's conviction was overly broad. The First Circuit apparently refused to accept it, finding incompatibility with Maze (App. 3(a)11). The Court stated that ". . . under this

[the government's] test, the conviction in United States v. Maze, supra, would have been affirmed." (App. 3(a)12). Yet, in direct contravention of this statement the Greenleaf conviction was upheld.

The law of mail fraud was in disarray prior to the ruling. It is in worse stead in its aftermath. The inability of the Court to do no more than delineate the conflicting positions of those courts which have thus far faced the problem is indicative of the need for further guidance from this Honorable Court. It furthermore indicates that the petitioner was in fact found guilty by a clear and grossly unjust misapplication of legal principle.

III. THE IMPOSITION OF CONSECUTIVE SENTENCES FOR VIOLATIONS OF THE RACKETEERING CORRUPT ORGANIZATIONS ACT (18 U.S.C. SEC. 1962(C)) AND THE PREDICATE OFFENSES OF MAIL FRAUD, (18 U.S.C. SEC. 1341) IS VIOLATIVE OF THE DEFENDANT'S FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY.

The defendant was sentenced to two years imprisonment for the substantive RICO violation and was given suspended two year sentences for the predicate mail fraud offenses to be served concurrently upon completion of the sentence imposed for racketeering. Two years probation was given in lieu of the two year mail fraud sentences and a fine of $2,500 was ordered. (App. p. 1(a)).

The Fifth Amendment guarantee against double jeopardy protects one from multiple punishments for the same offense. Ex parte Lange, 18 Wall. 163, 168, 21 L.Ed. 872; Whalen v. U.S., 445 U.S. 684, 100

S.Ct. 1432,1436, 64 L.Ed.2d. 715 (1980); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072,2076, 23 L.Ed.2d. 656 (1969); U.S. Constitution, Amendment 5. At the very least, this precludes federal courts from imposing multiple sentences unless Congress has so authorized. Whalen at 1436. It is, of course, constitutionally the domain of the legislature to define criminal offenses and prescribe punishment. See U.S. v. Wiltberger, 5 Wheat. 76,95, 5 L.Ed. 37. This Court, in Blockburger v. U.S., 284 U.S. 299, 304, 52 S.Ct. 180,182, 76 L.Ed. 306 (1932), adopted what had long been judicial practice in statutory interpretation under the Double Jeopardy Clause, based upon the assumption that Congress does not intend to punish the same offense under different statutes. Whalen at 1438. The "Blockburger test" used in the absence of a clear

statutory mandate, requires that multiple punishments are suitable only where proof of each offense "requires proof of an additional fact which the other does not." Blockburger at 304.

This standard is crucial where one criminal act must be proven as precursor to proof of another. Lesser and greater included offenses may be alleged separately. Gaunt v. U.S., 184 F2d 284,290 (1st Cir. 1950) cert. denied 340 U.S. 917 (1951). The same offense may also be alleged in separate counts. U.S. v. Honneus, 508 F2d 566,570 (1st Cir. 1974) cert. denied, 421 U.S. 948 (1975). Such pleading cannot result in multiple punishment, however, because the strictures of Blockburger cannot be satisfied. Consequently, Congress may treat varying aspects of the same conduct as separate offenses only where

there is a meaningful distinction between them. Honneus at 569.

The substantive RICO violation at issue in this case required a finding that the defendant was associated with an enterprise involved in interstate commerce and conducted the activities of that enterprise through a pattern of racketeering activity. 18 U.S.C. sec. 1962(c). A "pattern of racketeering activity" requires the commission of two or more enumerated acts which include violation of the mail fraud provisions of 18 U.S.C. sec. 1341. 18 U.S.C. sec. 1961 (5) and (1)(B). Thus, to find the defendant guilty of the RICO violation it was necessary to first find him guilty of at least two counts of mail fraud as alleged in the indictment. Applying the "Blockburger test", the elements of mail fraud plus the additional facts of

"enterprise" (membership in Teamster Local 25) and "conducting the activities through" (acts committed while performing Teamster duties) were required for a RICO conviction pursuant to 18 U.S.C. sec. 1962(c). Once the predicate mail fraud offenses were elected by the government in framing the RICO indictment, they became lesser included offenses of the RICO offense.

Those cases which have thus far faced the double jeopardy dangers of RICO have found it permissable to charge a defendant with both RICO and the predicate offenses. U.S. v. Frumento, 563 F2d 1083, 1089 (3rd Cir. 1977); U.S. v. Grande, 620 F2d. 1026,1030 (4th Cir. 1980); U.S. v. Stofsky, 409 F.Supp. 609, 617-18 (SDNY 1973) aff'd 527 F2d 237 (2nd Cir. 1975) cert. denied 429 U.S. 819 (1976). But it has been noted that:

> The issue of multiple punishment for the same criminal act will not ripen unless and until guilty verdicts are returned on the allegedly overlapping counts, or unless and until it becomes obvious at trial that the evidence with respect to the contested counts is, in fact, the same.
>
> Stofsky, at 618

The Second and Ninth Circuits have since faced the question and ruled in favor of consecutive sentencing. U.S. v. Rone, 598 F2d 564 (9th Cir. 1979); U.S. v. Boylan, 620 F2d 359 (2nd Cir. 1980); U.S. v. Scotto, 641 F2d 47 (2nd Cir. 1980). The defendant in Rone, the leading case, was convicted of murder and extortion as predicates to the substantive RICO violation. Consecutive sentences were imposed. Yet, as Barry Tarlow has pointed out in his commentary RICO, The New Darling Of The Prosecutor's Nursery:

> Rone, however, should not be regarded as persuasive authority because it failed to recognize that

> the significant issue is not whether the offenses are identical so that they cannotr be prosecuted separately, but whether the predicate offenses are lesser included offenses within a RICO offense.
> 49 Fordham L. Rev. 165,263

The Rone court itself hinted at the error of its ways. "If the RICO sec. 1962(c) charge was based solely on the two extortions, there might be problems under Blockburger. Rone at 576. Obviously, the decision in Rone was based on the fact that the government had charged two different predicate offenses one of which was murder. In this case, the predicate offenses are both mail fraud and the reasoning in Rone is not applicable.

The legislative purposes of 18 U.S.C. secs. 1341 and 1962(c) are functionally the same. Mail fraud proscribes use of the mails for fraudulent

purposes. RICO is triggered when that use is multiplied and becomes a corrupting influence upon an enterprise.

The RICO offenses were formulated to hamstring the efforts of individuals who would conduct the affairs of an enterprise in a "racketeering" manner. The Ninth Circuit is correct in pointing out that RICO was to provide for "new penal provisions and enhanced sanctions." Rone at 572; see also Organized Crime Control Act of 1970, Statement of Findings and Purpose, 84 Stat. 922, reprinted. The statute satisfies that purpose. Punishment provided is harsh and includes unique forfeiture provisions. 18 U.S.C. sec. 1963. The effect is to enhance the sanctions already existing for predicate offenses by creating what is essentially a penalty for aggravated behavior.

Thus, with no clear legislative statement to the contrary, separate punishment is highly improper when, as here, the predicate offenses charged are in substance lesser included. It cannot withstand the test of Blockburger. What cannot be allowed is to punish a defendant with the increased RICO sanctions and then punish the defendant again for the same offenses under the predicate statute. The trial court violated not only the specific guarantee against double jeopardy in doing so but also the principle of separation of powers be exceeding its authority in the imposition of multiple consecutive sentences. Whalen at 1436-37.

IV. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY INSTRUCTING THE JURY THAT A PERSON INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTIONS WHERE CONVICTION BEYOND A REASONABLE DOUBT WAS BASED UPON A FINDING OF SPECIFIC INTENT.

The petitioner was convicted of knowingly and willfully aiding and abetting four mail fraud violations as precursors to a conviction for aiding and abetting a substantive violation of the Racketeering Influenced Corrupt Organization Act. 18 U.S.C. sec. 1341, 1961(c).

Intent is an essential element in determining whether a defendant is guilty beyond a reasonable doubt of aidig and abetting the commission of a crime. Nye & Nissen v. U.S., 336 U.S. 613, 619, 69 S.Ct. 766,770, 93 L.Ed 919 (1949). A proper, comprehensive instruction to the jury on the issue of intent is

mandated where it is of such material importance. U.S. v. Winter, 663 F2d. 1120,1145 (1st Cir. 1981).

The trial judge instructed the jury that "It is reasonable, however, for you to infer that a person ordinarily intends the natural and probable consequences of any act you find he knowingly did." (f/n 10). This is substantially that instruction which this Court declared unconstitutional in Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). The First Circuit condemned a nearly identical instruction in U.S. v. Winter, 663 F2d 1120,1143-44 (1st Cir. 1981). See also U.S. v. Ariza-Ibarra, 605 F2d 1216 (1 Cir.

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f/n 10 - Defense counsel made a timely objection to the instruction.

1976). The Court held that "it is always error to instruct the jury that a person is presumed to intend the natural and probable or ordinary consequences of his acts. . .this sort of instruction should not be used." Winter at 1144. A juror could reasonable view the instruction as a mandatory presumption, either irrebutable or operating to shift the burden of proof on the matter of intent to the defendant. Winter at 1144.

Two aspects of the mail fraud conviction are affected by this presumption. Mail fraud requires a finding of specific intent to defraud. U.S. v. Proctor & Gamble Co., 47 F.Supp. 676 (D.C. Mass. 1942); U.S. v. Keane, 552 F2d 534,544 (7th Cir. 1975) cert. denied, 424 U.S. 976, 96 S.Ct. 1481, 42 L.Ed.2d 746 (1976). This is crucial, otherwise innocent activity results in

criminal conviction. Badders v. U.S., 240 U.S. 391,394, 36 S.Ct. 367, 60 L.Ed.706 (1916). The presumptive instruction allows specific intent to be inferred from any act resulting in fraud.

Mail fraud also requires a finding that the defendant contemplated the use of the mails in furtherance of the fraudulent scheme. Proctor & Gamble at 679. The jury was instructed to ask whether Greenleaf "knowingly or willfully placed or caused to be placed in an authorized depository for the mail. . ." the items in question. Here, the presumptive instruction results in an equally distressing conclusion. Use of the mails in furtherance of a scheme to defraud is presumed to have been contemplated.

In the Winter case, the First Circuit sternly criticized the instruction given yet found that it did not contribute to the defendants' mail fraud and RICO convictions. U.S. v. Winter at 1145. The defendants had not claimed that they did not intend the natural consequences of their actions; they denied the actions altogether and thus the instruction was not material to conviction.

Petitioner Greenleaf did not deny his actions. He asserted that he had no criminal intent whatsoever in doing them. Yet, the First Circuit, despite the obvious distinction from Winter, ruled just as before - sternly criticising the use of the presumptive instruction yet finding it harmless (App. 3(a)17-19).

An instruction is not harmless error when for there exists a "reasonable

possibility that the evidence (error) complained of might have contributed to the conviction." Chapman v. California, 386 U.S. 18,23, 87 S.Ct. 824,827, 17 L.Ed.2d. 705 (1967) quoting Fahey v. Connecticut, 375 U.S. 85,86-87, 84 S.Ct. 229,230-231, 11 L.Ed.2d 171 (1963). The First Circuit has sanctioned a blatant departure from the practice this Court has mandated for the conduct of a responsible judiciary. If the lesson of Sandstrom v. Montana is to be an effective tool for simplifying and elucidating the language of the law for the jury, it must be enforced.

G. CONCLUSION

For these reasons the Writ of Certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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